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5                   UNITED STATES DISTRICT COURT  
6                   EASTERN DISTRICT OF WASHINGTON

7                   UNITED STATES OF AMERICA,

8                   Plaintiff-Respondent,

9                   v.

10                  OMAR ALARCON FUENTES,

11                  Defendant-Petitioner.

NO: 2:13-CR-0125-TOR-2  
2:16-CV-0376-TOR

ORDER DISMISSING § 2255  
MOTION

12                  BEFORE THE COURT is Petitioner's Motion Under 28 U.S.C. § 2255 to

13 Vacate, Set Aside, or Correct Sentence (ECF No. 236). This matter returns from

14 the Ninth Circuit for implementation of its directive.

15                   **BACKGROUND**

16                  A jury convicted Petitioner of knowingly distributing over 50 grams of  
17 methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii).

18 Petitioner was sentenced and he appealed his conviction. The Ninth Circuit issued  
19 a memorandum disposition affirming Petitioner's conviction. See ECF No. 248.

20 The Ninth Circuit declined to consider Petitioner's ineffective assistance of

1 counsel argument on direct review, *id.* at 4, explaining that neither extraordinary  
2 exception to the general rule applied, leaving the issue for collateral review. A  
3 petition for rehearing or rehearing *en banc* was filed, but it was eventually rejected.  
4 ECF No. 256.

5 While the appeal was pending, Petitioner filed a § 2255 motion which raised  
6 his ineffective assistance of counsel claims. ECF No. 236. This Court processed  
7 Petitioner's motion and denied the same. ECF No. 251. Petitioner appealed.

8 The Ninth Circuit vacated and remanded. In its Order, the Ninth Circuit  
9 explained that a district court should not entertain a habeas corpus petition while  
10 there is an appeal pending. It then ruled, "Accordingly, we summarily vacate the  
11 district court's order and remand for the district court to dismiss appellant's section  
12 2255 motion without prejudice." ECF No. 258. The Mandate from the Ninth  
13 Circuit issued December 12, 2017. ECF No. 259.

14 **ACCORDINGLY, IT IS ORDERED:**

- 15 1. Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct  
16 Sentence (ECF No. 236) is **DISMISSED without prejudice.**
- 17 2. Since this Order effectuates the Ninth Circuit's directive, this Court further  
18 certifies that there is no basis upon which to issue a certificate of  
19 appealability. 28 U.S.C. § 2253(c); Rule 11, Rules—Section 2255  
20 Proceedings.

1 The District Court Executive is directed to enter this Order and provide  
2 copies to the parties and **CLOSE** this file, and the corresponding civil file.

**DATED** December 19, 2017.



THOMAS O. RICE  
Chief United States District Judge